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Supreme Court, U.S.
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No. 96-31

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

EVELYN SMITH,

Petitioner,

v.

FAIR EMPLOYMENT AND HOUSING COMMISSION, KENNETH PHILLIPS, AND GAIL RANDALL,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of California

REPLY TO BRIEF IN OPPOSITION

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I. THIS COURT SHOULD REVERSE THE CALIFORNIA SUPREME COURT'S DECISION BECAUSE IT REMOVES PROTECTION FOR MOST PEOPLE UNDER RFRA AND THE FREE EXERCISE CLAUSE WITH ITS EXTREME INTERPRETATION OF "SUBSTANTIAL BURDEN."

The California Supreme Court's harsh and unprecedented interpretation of what constitutes a "substantial burden" under the Religious Freedom Restoration Act (RFRA) and the Free Exercise Clause eliminates protection for religious liberties under these two provisions for most Californians. Under the reasoning of the California Supreme Court, if the religious person can do anything to remove herself from the situation -- such as selling her four town homes and permanently abandoning her occupation as a landlord -- there is no "substantial burden" on her religious liberties.

The California Supreme Court's decision means that no matter what onerous penalty the Fair Employment and Housing Commission imposed on Mrs. Smith, she could not suffer a "substantial burden" under RFRA or the Free Exercise Clause because she could sell her property, pay capital gains taxes and stop earning her income as a landlord. This reasoning ignores this Court's decisions interpreting the Free Exercise Clause which Congress relied upon in drafting RFRA. See 42 U.S.C. §2000bb(b). Further, the California Supreme Court's decision really speaks to what Mrs. Smith might have done in the past to avoid this litigation, but the decision ignores the fact that Mrs. Smith can do nothing now to remove the Commission's penalties already imposed on her. She is burdened now.

This Court has ruled that government action forcing a person to choose between her religious beliefs and her livelihood is a substantial burden on their rights under the Free Exercise Clause, *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). This Court said that when the government forces someone to choose between their livelihood and their religious beliefs, the

government "puts the same kind of burden upon the free exercise of religion as would a fine against her for ... [religious] worship." *Id.* Congress specifically adopted this *Sherbert* standard to determine whether a "substantial burden" exists under RFRA. *See* 42 U.S.C. §2000bb(b).

The Commission challenges Mrs. Smith's factual assertion that she earns her livelihood by renting her four town homes. However, she testified at the administrative hearing:

> Q: When you say a source of income is your duplexes, would explain that please?
>
> Mrs. Smith: The income from my duplexes is my main source of income.

Hearing Transcript, Vol. II; page 52. This Court should grant review and reverse the California Supreme Court's extreme interpretation of what constitutes a substantial burden under RFRA and the Free Exercise Clause. That action would restore protection under RFRA and the Free Exercise Clause now made inaccessible to most Californians by their high court.

II. THE CALIFORNIA SUPREME COURT'S DECISION CONFLICTS WITH DECISIONS OF THREE OTHER STATE SUPREME COURTS.

The respondents argue that the California Supreme Court's decision does not conflict with the three state supreme court decisions from Massachusetts, Alaska and Minnesota involving landlords claiming religious exemptions from prosecution for refusing to rent to unmarried couples. California's decision conflicts with those of the other three state supreme courts on the issue of substantial burden. Justice Clarence Thomas stated, "there is no doubt that these decisions applied the *Sherbert*-

Yoder test adopted by RFRA," *Swanner v. Anchorage Equal Rights Commission,* 130 L.Ed.2d 369, 370, n. 2 (dissent from denial of certiorari). Each of the three state supreme courts used the compelling state interest test used in RFRA and found that the states' prosecution of the landlords substantially burdened the landlords' religious liberties.

Massachusetts - in *Attorney General v. Desilets*, 418 Mass. 316, 636 N.E.2d 233 (1994), the Massachusetts Supreme Judicial Court applied the state constitution's free exercise clause to a case of two Catholic landlords who refused to rent to a cohabiting couple. That court said that its state free exercise test "appears to be the same as that prescribed by the Religious Freedom Restoration Act of 1993 (42 U.S.C. §2000bb *et seq.*)," 418 Mass. at 322, n.8. The Massachusetts high court said, "[h]ere ... the government has placed a burden on the defendants that makes their exercise of religion more difficult and more costly. The statute affirmatively obliges the defendants to enter into a contract contrary to their religious beliefs and provides significant sanctions for its violation," 418 Mass. at 324. This conflicts with California's decision.

Alaska - In *Swanner v. Anchorage Equal Rights Commission,* 874 P.2d 274 (1994), the Alaska Supreme Court rejected the RFRA claim of a landlord who refused to rent to unmarried couples on the grounds that the state has a compelling state interest in "combating discrimination," 874 P.2d at 280, n. 9. Although the Alaska Supreme Court did not discuss the substantial burden issue under RFRA, a court cannot reach the compelling state interest issue under the language of RFRA unless it first addresses the substantial burden prong. In 42 U.S.C. §2000bb-1(b), RFRA states that "[g]overnment may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person -- (1) is in furtherance of a compelling governmental interest...."

Even the Commission in Mrs. Smith's case concedes that the Alaska Supreme Court assumed that the landlord's rights had been substantially burdened under RFRA: "[u]nlike the Alaska Supreme Court, the California Supreme Court did not assume that the prerequisite for application of RFRA -- that is, a substantial burden -- existed." Commission's Brief at 9.

Minnesota -- In *State ex rel. Cooper v. French*, 460 N.W.2d 2 (1990), the Minnesota Supreme Court ruled 4-3 that the evangelical landlord did not violate the state statute prohibiting marital status discrimination. Six of the seven justices addressed the state free exercise claim, by applying the compelling state interest test used in RFRA. All six found that the landlord's religious liberty rights had been substantially burdened under the compelling state interest test used in RFRA. *See* 460 N.W.2d at 10 and 14-15. They divided 3-3 on whether the state had a compelling interest to justify that substantial burden on the landlord's religious liberties.

The California Supreme Court's ruling conflicts with these three state supreme courts decisions on whether the landlords suffered a substantial burden.

III. THE CALIFORNIA SUPREME COURT'S DECISION CONFLICTS WITH EIGHT FEDERAL APPEALS COURT DECISIONS INTERPRETING RFRA.

Eight federal appeals courts have interpreted RFRA, and the California Supreme Court's decision conflicts with all of them on the issue of substantial burden. Under all of the eight federal appeal courts' tests interpreting RFRA, the state's actions against Mrs. Smith would "substantially burden" her rights under that law. Chief Judge Richard Posner of the Seventh Circuit summarized these various circuit court tests in *Mack v. O'Leary*, 80 F.3d 1175, 1178 (7th Cir. 1996):

> The Fourth, Ninth and Eleventh Circuits define "substantial burden" as one that either compels the religious adherent to engage in conduct that his religion forbids (such as eating pork, for a Muslim or Jew) or forbids him to engage in conduct that his religion requires (such as prayer). *Goodall by Goodall v. Stafford County School Board*, 60 F.3d 168, 172-73 (4th Cir. 1995); *Cheffer v. Reno*, 55 F.3d 1517, 1522 (11th Cir. 1995); *Bryant v. Gomez*, 46 F.3d 948 (9th Cir. 1995) (per curiam). The Eighth and Tenth Circuits use a broader definition -- action that forces religious adherents "to refrain from religiously motivated conduct," *Brown-El v. Harris*, 26 F.3d 68, 70 (8th Cir. 1994), or that "significantly inhibit[s] or constrain[s] conduct or expression that manifests some central tenet of a [person's] individual beliefs," *Werner v. McCotter*, 49 F.3d 1476, 1480 (10th Cir. 1995), imposes a substantial burden on the exercise of the individual's religion. The Sixth Circuit seems to straddle this divide, asking whether the burdened practice is "essential" or "fundamental" *Abdur-Rahman v. Michigan Dept. Of Corrections*, 65 F.3d 489. 491-92 (6th Cir. 1995).

In *Mack*, the Seventh Circuit ruled that a person shows a substantial burden under RFRA when the government "forces adherents of a religion to refrain from religiously motivated conduct, inhibits or constrains conduct or expression that manifests a central tenet of a person's religious beliefs, or compels conduct or expression that is contrary to those beliefs." *Mack*, 80 F.3d at 1179. Under any of these tests used by the eight federal appeals courts, Mrs. Smith suffered a

"substantial burden." The California Supreme Court's interpretation of RFRA is far removed from the center of the debate among the federal appeals courts on what constitutes a substantial burden under RFRA. This Court should grant review and reverse the California Supreme Court's extreme decision on substantial burden.

IV. THIS COURT SHOULD REVIEW THE "COMPELLING STATE INTERESTS" RAISED BY THE RESPONDENTS.

A. This Court Should Reject Anew The Respondents' Argument that Free Exercise Exemptions Violate the Establishment Clause.

The respondents assert that the State has a compelling interest in obeying the Establishment Clause, which they argue they would violate by granting Mrs. Smith a religious liberty exemption. Commission's Brief at 28-30; Cohabiting Couple's Brief at 25-29. They are really arguing that RFRA and the Free Exercise Clause violate the Establishment Clause. The Court of Appeal rejected that argument, App. 178a, n. 13.The California Supreme Court did not address it, App. 41a, n. 21.

This Court should grant review and again reject this extreme Establishment Clause argument as it has done repeatedly in the past. In *Hobbie v. Unemployment Appeals Commission of Florida*, 480 U.S. 136, 144-45 (1987), Justice Brennan wrote for this Court:

> This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause.

This Court also stated this principle at least twice before in *Board of Education of Kiryas Joel v. Grumet,* 129 L.Ed.2d 546 (1994) and *Lynch v. Donnelly,* 465 U.S. 668, 673 (1984).

The respondent's harsh argument would eliminate every statutory or judicial exemption for religious believers, no matter how benevolent or innocuous. This Court should grant review and rule that granting exemptions under RFRA or the Free Exercise Clause do not violate the Establishment Clause.

B. This Court Should Grant Review and Rule That "Eradicating All Forms of Discrimination" Is Not a Proper Compelling State Interest.

The respondents claim that they have a compelling state interest in eradicating all forms of discrimination by business establishments, in providing equal opportunity and in protecting personal dignity. Commission Brief at 24-27; Cohabiting Couple's Brief at 25-27. The respondents try to characterize Mrs. Smith's refusal to rent to the unmarried couple as a morally evil act akin to an act of racial discrimination. *Id.*

This Court should grant review and rule that in this case the state cannot lump Mrs. Smith's actions against the cohabiting couple together with reprehensible acts of racism and then assert a generalized compelling state interest in eradicating all forms of discrimination to justify its actions against Mrs. Smith. The respondents may not argue that because racial discrimination is bad, so are Mrs. Smith's actions in this case. Combating marital status discrimination does not rise to the same moral or constitutional level as eradicating racial discrimination. This Court ruled that the government's interest in eliminating a classification of discrimination under the Equal Protection Clause varies

depending on the specific classification in question. *See Cleburne v. Cleburne Living Center,* 473 U.S. 432 (1985). Mrs. Smith testified that she refuses to rent to smokers and pet owners. Hearing Transcript, Vol. II, pp. 53-4. Does the state have a compelling state interest to punish Mrs. Smith for those types of "invidious discrimination" as well?

The state undermines its claimed compelling state interest to protect unmarried couples because the state fair housing law exempts all state and private universities and colleges in California from the provisions banning marital status discrimination by permitting married student housing and single sex dorms. California Government Code §12995(2).

Gail Randall, the female unmarried cohabitant in this case, was a student at Chico State University at the time of incidents triggering this case. App. 199a. If Mrs. Smith had earned her livelihood by working as the housing director at Chico State, she could have legally refused to rent campus housing to Gail Randall and her unmarried partner. In fact, all 19 state universities in California at the time of the trial had rules prohibiting unmarried couples from rooming together in campus housing. Hearing Transcript Vol. II, p. 124. In spite of that fact, the state now prosecutes Mrs. Smith for doing the very thing that the state does as a landlord.

Also, California courts and the California Legislature have repeatedly refused to grant unmarried couples the same legal rights as married couples. App. 139a-140a. California does not uniformly enforce this supposed compelling state interest. This Court should grant review and reject the overbroad statement of the compelling state interest as "eradicating all forms of discrimination," and rule that the real state interest in this case of protecting the housing of cohabiting couples is not compelling for religious liberties purposes.

C. This Court Should Grant Review and Rule That State Constitutional Rights Do Not Override Mrs. Smith's Rights Under RFRA and the Free Exercise Clause.

The respondents argue that the State has a compelling state interest in protecting the unmarried couples' state constitutional right to privacy about matters of sexual intimacy. The Court of Appeals rejected this argument, 188a-191a. The California Supreme Court did not address this issue. App. 9a and 16a.

This Court should grant review and rule again that a state constitutional right cannot trump a federal constitutional right, *Widmar v. Vincent,* 454 U.S. 264, 276 (1981), or a federal statutory right, such as RFRA. *Garnett v. Renton, Washington School District,* 987 F.2d 642, 646 (9th Cir. 1993).

V. THE SIGN-POSTING REQUIREMENT IS PROPERLY BEFORE THIS COURT.

The respondents argue that the sign-posting requirement is no longer in this case because the Commission voluntarily withdrew that punishment at the California Court of Appeal. However, the California Court of Appeal refused to allow the Commission to withdraw that requirement. The Court of Appeal criticized the Commission's efforts because they were intended "to foreclose review of [the Commission's] 'usual remedial practice' under the heightened standard applicable to "hybrid" cases as explained in *Smith.*" App. 170a, n.9.

The California Supreme Court declined to rule on this issue. App. 24a, n. 15. This Court should not allow the Commission to avoid judicial review of its sign-posting requirement by unilaterally pulling the requirement out of the case when the

Commission thinks the requirement may be struck down. The Commission's sign-posting requirement is therefore "capable of repetition, yet evading review," *Carroll v. Princess Anne*, 393 U.S. 175, 178-79 (1968).

VI. The Property Rights Issues are Properly Presented to This Court.

The California Supreme Court ruled that Mrs. Smith suffered no burden on her religious freedom because she could simply sell her four townhouses and permanently abandon her occupation as a landlord. App. 32a and 40a. Because the government forces Mrs. Smith to sell her land or violate her religious convictions, Mrs. Smith properly asserts a hybrid claim of free exercise rights combined with federal property rights. With its ruling, the California Supreme Court placed these federal Takings issues front and center in this case.

CONCLUSION

For these reasons, petitioner Evelyn Smith asks this Court to grant the petition for writ of certiorari.

Respectfully submitted,

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